(2)

No. 91-664

In the Supreme Court of the United States

OCTOBER TERM, 1991

AVERY MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in a Hobbs Act prosecution of a public official for extortion under color of official right, the government must prove that the defendant induced the victim to make the unlawful payment by means of an explicit or implicit demand.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the judgment is noted at 933 F.2d 1010 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1991. A petition for rehearing was denied on July 19, 1991. The petition for a writ of certiorari was filed on October 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on 18 counts of extortion or

attempted extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951(a). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed.

1. Petitioner became the elected sheriff of Blount County, Tennessee, on September 1, 1986. Shortly after taking office, petitioner arranged a meeting with Jackson Sanford, the president of the East Tennessee Bonding Company, one of the five companies authorized at time to write bail bonds in Blount County. Sanford arrived at the meeting with an employee of his company. Although Sanford had supported petitioner's opponent in the election for sheriff, he offered petitioner a $1500 postelection campaign contribution. Petitioner then asked to speak privately with Sanford. After the employee left, petitioner accepted the $1500 contribution. According to Sanford's testimony, petitioner then advised Sanford that if he intended to write bonds in Blount County and if he wished to be considered the favored bonding company, he would have to pay petitioner $1000 per month. Sanford countered with an offer of $500 per month and they settled on $750 per month, payable quarterly. Sanford testified that petitioner was in a position to hurt his bonding company and that a previous sheriff "froze out" his business until he made the payoffs demanded by that sheriff. Sanford described his payments to petitioner as "protection money" that he paid so that his business would get a "fair shake." Pet. App. 2a-4a.

Sanford made nine payments to petitioner, totaling $19,500, between January 1987 and January 1989. Petitioner repeatedly cautioned Sanford not to disclose the payments to anyone or they would "go down" together. Sanford decided to stop the pay-

ments in March 1989. Petitioner told Sanford, "You'll be back soon, you'll come back . . . you can see me anytime you want to." On the day before petitioner's arrest, he told Sanford that both of them would be in the same trouble if Sanford revealed their arrangement. Pet. App. 5a-6a.

In January 1987, petitioner solicited payments from Quenton Stiles, one of the owners of the Blount County Bonding Company, a second bonding company that did business in the County. Petitioner arranged to talk with Stiles privately. He told Stiles that it had always been "customary to take care of the sheriff." As he said this, petitioner rubbed his fingers and thumb together. Stiles wanted no part of the payoff arrangement, but he was concerned that he would lose business if he did not pay. After considering his predicament, Stiles went to the authorities. Pet. App. 6a.

Beginning in April 1987, Stiles, in cooperation with the FBI, made monthly payments to petitioner through August 1987, and once again in February 1989, using currency furnished by the FBI. Tape recordings of their meetings showed that petitioner frequently commented about how petitioner had "done right" by Stiles and vice versa. Petitioner also commented that some other bondsmen, who had given petitioner trouble, were not doing well in the County. Pet. App. 7a.

2. With respect to the crime of extortion under color of official right, the jury was instructed in part as follows (Tr. 479-480; C.A. App. 563-564):

> Now, extortion under color of official right means the obtaining of property, including money, by a public official, by the misuse of his office, when the property obtained was not lawfully due and owing to him or to his office.

> Thus, extortion under color of official right does not require proof of specified acts by the public official demonstrating force, threats, intimidation or the use of fear so long as the person making payment consented to do so because of the office or position held by the official.
>
> Now, where the extortion is alleged to have been committed under color of official right, the government is not required to prove any overt inducement or solicitation of payment by the public official.
>
> In order to prove extortion under color of official right, rather than by wrongful use of fear, the government must prove, beyond a reasonable doubt, that payments were made to the public official with the reasonable expectation that the public official would extend some benefit or refrain from some harmful action, harmful action. It need not prove that benefits were actually extended.
>
> Additionally, the government must prove that the person making the payment held, and the defendant exploited, a reasonable belief and expectation that because of the defendant's public office, he had the ability to extend the benefit sought or prevent the harm feared.

The district court rejected an instruction sought by petitioner that the "inducement" required to prove a conviction "must either be in the form of a 'demand' or the communication of a custom or expectation, communicated by the nature of the defendant's prior conduct of office." C.A. App. 79.

3. The court of appeals affirmed petitioner's convictions. It rejected petitioner's contention that the jury should have been instructed that, in order to convict, it must conclude that unlawful payments were "induced" by explicit or implicit "demands" for payment by petitioner. The court of appeals agreed

with the majority view, concurred in by all but two circuits, that the Hobbs Act is violated by the public official's receipt of money not lawfully due him when the official knows that the motivation for the payment focuses on his public office. Pet. App. 10a-12a.[1]

ARGUMENT

Petitioner points out that in *Evans* v. *United States*, No. 90-6105 (argued Dec. 9, 1991), this Court should "resolve the precise issue Mr. Mills presents in the instant petition." Pet. 24. That is correct. The defendant in *Evans*, an elected county commissioner, was convicted of extortion under color of official right in violation of the Hobbs Act on the basis of his receipt of a payoff from a developer. In *Evans*, the Eleventh Circuit—like the court of appeals in this case and the majority of the other circuits—held that the government need not show, in a prosecution alleging extortion under color of official right, that the defendant induced a payoff by making a demand or a threat.[2] The meaning of "un-

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[1] Without discussion, the court of appeals also rejected as meritless petitioner's challenges to other aspects of the district court's definition of the Hobbs Act offense in the charge to the jury. Pet. App. 9a, 13a.

[2] See, *e.g.*, *United States* v. *Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); *United States* v. *Spitler*, 800 F.2d 1267, 1274-1275 (4th Cir. 1986); *United States* v. *Jannotti*, 673 F.2d 578, 594-596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *French*, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *Williams*, 621 F.2d 123, 123-124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States* v. *Butler*, 618 F.2d 411, 417-418 (6th Cir.), cert. denied, 447 U.S. 927 (1980); *United States* v. *Hall*, 536 F.2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919

der color of official right" and the nature of the "inducement" requirement, if any, are presented in the *Evans* case. Accordingly, the petition in this case should be held for *Evans*, and disposed of in light of the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's decision in *Evans* v. *United States*, No. 90-6105.

Respectfully submitted.

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(1976); *United States* v. *Hathaway*, 534 F.2d 386, 393-394 (1st Cir.), cert. denied, 429 U.S. 819 (1976). Two courts of appeals have taken the view that the government must show that the public official took some action to induce the transfer of property. See *United States* v. *Aguon*, 851 F.2d 1158 (9th Cir. 1988) (en banc); *United States* v. *O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc).

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